UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY Employer, and COLLEGE ATHLETE PLAYERS ASSOCIATION (CAPA), Petitioner.	)	No. 13-RC-121359

AMICUS CURIAE BRIEF OF MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION, NATIONAL HOCKEY PLAYERS UNION, MAJOR LEAGUE SOCCER PLAYERS UNION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, AND NATIONAL BASKETBALL PLAYERS ASSOCIATION IN SUPPORT OF PETITIONER COLLEGE ATHLETES PLAYERS ASSOCIATION

MICHAEL RUBIN
ERIC P. BROWN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
Email: mrubin@altber.com
ebrown@altber.com
Attorneys for Amici Curiae

(Additional Counsel Next Page)

DAVID PROUTY
MATT NUSSBAUM
Major League Baseball Players Association
12 E. 49th Street, 24th Floor
New York, NY 10017
Telephone: (212) 826-0808
Fax: (212) 307-6904
dprouty@mlbpa.com
mnussbaum@mlbpa.com

DON ZAVELO
National Hockey League Players' Association
20 Bay Street, Suite 300
Toronto, ON M5J 2N8
Telephone: (416) 313 2356
Fax: (416) 313-2301
dzavelo@nhlpa.com

JON NEWMAN
Major League Soccer Players Union
7700 Old Georgetown Road, Suite 730
Bethesda, MD 20814
Telephone: (202) 785-9300
Facsimile: (202) 775-1950
newman@shermandunn.com

TOM DePASO
National Football League Players Association
63 Gene Upshaw Place
1133 20th Street, NW
Washington, D.C. 20036
Phone: (202) 756-9128
Facsimile: (202) 756-9316
Tom.DePaso@nflplayers.com

RON KLEMPNER
AMY GOLD
National Basketball Players Association
310 Lenox Avenue
New York, NY 10027
Phone: (212) 655-0880
Facsimile: (212) 655-0881
ron.klempner@nbpa.com
amy.gold@nbpa.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

ADMINISTRATIVE DECISIONS

FEDERAL STATUTES

MISCELLANEOUS

I. Introduction

Northwestern University's grant-in-aid scholarship football players provide valuable labor services to Northwestern, spending upwards of 50 hours per week performing highly skilled physical and mental work in exchange for significant compensation: a full-ride athletic scholarship valued at roughly of $76,000 per year. Decision and Direction of Election ("RD Decision") at 6-8, 14, 18. By signing a National Letter of Intent and a "tender" from the university, and committing to represent Northwestern on the football field throughout their period of eligibility, these highly skilled individuals become subject in turn to an extensive set of rules and procedures established by Northwestern and implemented though its Division I football coaching staff, that govern almost every aspect of those athletes' daily lives, both on the field and off. *Id.* at 4-5, 15-16.

After a six-day evidentiary hearing, Regional Director Peter Ohr found that these players are "employees" under Section 2(3) of the Act, 29 U.S.C. §152(3), that the College Athletes Players Association ("CAPA" or the "Association") is a labor organization within the meaning of Section 2(5), *id.* §152(5), and that the petitioned-for unit is appropriate. RD Decision at 21-23. Northwestern challenges those findings and opposes CAPA's representation petition.

Two of the arguments advanced by Northwestern are the focus of this amicus brief submitted by the five major North American sports unions. First, Northwestern contends that outside constraints (principally, NCAA and Big Ten Conference rules) limit its ability to meaningfully bargain over any significant terms or conditions of its athletes' "employment," Request for Review ("RFR") at 30, 43. Second, Northwestern contends that any bargaining with CAPA on behalf of grant-in-aid football players would necessarily and impermissibly encroach upon the university's academic freedoms and management prerogatives. *Id.* at 37-38.

Amici disagree with both arguments, based on our practical experience in collective bargaining and member representation in the fields of professional football, basketball, baseball, hockey, and soccer, coupled with our understanding of the basic labor law principles underlying the NLRA. Although amici fully support CAPA for the reasons stated in its briefs (which the Regional Director largely adopted in his decision), we limit our discussion below to these two arguments.

First, it is well settled under existing Board law and U.S. Supreme Court precedent that even when external constraints outside the control of the parties limit the available subjects or scope of bargaining – for example, when state or federal laws establish minimum statutory protections that cannot be bargained away – the parties may still insist on good faith bargaining consistent with those constraints. Amici have considerable experience bargaining collectively over matters of great importance to the athletes we represent. That experience confirms, as a practical matter, that CAPA and Northwestern could meaningfully bargain over many topics of great importance without running afoul of any of the "constraints" purportedly limiting Northwestern's ability to bargain over the terms of its football players' employment.

Second, although Northwestern warns that permitting grant-in-aid athletes to bargain over the terms and conditions of their employment would necessarily interfere with its ability to set academic policy and exercise academic freedom, that is simply a variant of the "management rights" argument that many employers typically make in bargaining. Amici have frequently bargained over the scope of management rights clauses as they affect the business of sports; and our long and successful history of bargaining refutes Northwestern's assertion that a sports union cannot further the fundamental interests of its "employee" members without unduly interfering with the teams' ability to further their own interests and the overall good of the game.

II. Interests of the Amici

The National Football League Players Association ("NFLPA"), the Major League Baseball Players Association ("MLBPA"), the National Hockey League Players' Association ("NHLPA"), the National Basketball Players Association ("NBPA"), and the Major League Soccer Players Union ("MLSPU") (collectively, the "Player Associations" or "amici") represent professional athletes in collective bargaining and for other purposes in, respectively, the National Football League, Major League Baseball, the National Hockey League, the National Basketball Association, and Major League Soccer (collectively, the "Leagues").

The Player Associations for many decades have represented professional athletes providing labor similar to that provided by the college football players in this case. As part of that representation, amici have engaged in collective bargaining with the Leagues in order to protect the interests of those professional athletes. The subjects of bargaining during those negotiations have been varied, including topics such as compensation, health and safety protections, work schedules, job security/compensation protection, and grievance procedures – all topics over which CAPA may seek to bargain should it be certified as the players' exclusive representative. The role that amici have played over the last several decades has made professional sports safer, improved compensation for athletes, and helped promote labor peace and constructive relationships between athletes and the Leagues.

This case concerns whether Northwestern's grant-in-aid scholarship football players are "employees" under Section 2(3) of the Act and, if so, whether they are entitled to all of the statutory protections that accompany "employee" status. Because of the inherent similarity between the labor provided by the college athletes at issue in this case and that provided by the professional athletes represented by amici Player Associations, amici have an interest in ensuring

that all employee athletes' labor is recognized as equally deserving of the Act's statutory protections.

III. Collective Bargaining Always Occurs Against the Backdrop of External Constraints, Both Legal and Practical, but the Existence of Those Constraints Does Not Preclude the Board From Certifying an Appropriate Bargaining Representative

The Executive Secretary's May 12, 2013 Notice and Invitation to File Briefs asked the parties and interested amici to address a series of questions, including whether the Board should "consider, in determining the parties' collective bargaining obligations, the existence of outside constraints that may alter the ability of the parties to engage in collective bargaining . . . ." Notice and Invitation to File Briefs ("Notice") at No. 6; *see also id.* No. 3 (asking what policy considerations are relevant to the Board's determination of "employee" status). For the reasons described below, the outside constraints identified by Northwestern should not affect whether its grant-in-aid football players are "employees" under the Act. Although outside constraints may limit the permissible scope of a party's collective bargaining obligations, those constraints simply constitute a backdrop to bargaining and provide no basis for depriving individuals who would otherwise be deemed statutory "employees" of the right to bargain – even if in the employer's judgment (or the Board's), bargaining can only encompass a limited range of issues.

Northwestern makes much of the fact that NCAA and Big Ten rules, and the university's own rules applicable to its student body as a whole, already govern many aspects of the relationship between the university and its grant-in-aid scholarship football players. *See* RFR at 30 ("[T]he vast majority of the rules [cited by the Regional Director] are related to regulations imposed upon the University by reason of its membership in the NCAA and the Big Ten Conference . . . ."); *id*. at 43 ("Northwestern does not have the authority to deviate from the NCAA and Big Ten Conference Rules, unless it is willing to forego a football program

altogether, which would make CAPA's goals not attainable through bilateral negotiations."). That may well be true. But it does not mean CAPA does not represent "employees" or that allowing CAPA to bargain on behalf of those employees would be pointless or would somehow undermine the purposes of the Act. As demonstrated below, there is much over which Northwestern and CAPA can bargain, and it is common for outside constraints – practical as well as legal – to affect the scope of collective bargaining. Whether such constraints are rooted in external law, contract obligations, the parties' economic or institutional needs, or raw bargaining power, the reality of collective bargaining is that parties never come to the table without limits on what they can and cannot bargain. The constraints identified by Northwestern, while perhaps overblown, are not dissimilar to the constraints faced by parties in all bargaining settings, particularly in regulated industries, and those constraints should neither deprive employee athletes of the NLRA's protections nor otherwise impede the formation of a constructive bargaining relationship.

In *Management Training Corp.*, 317 NLRB 1355 (1995), the Board squarely rejected the argument that it may not assert jurisdiction over workers because outside constraints limit the scope of subjects available for collective bargaining. The union in that case filed a representation petition seeking to represent the employees of a job training center managed under contract with the U.S. Department of Labor. *Id.* at 1355. The Regional Director dismissed the petition for lack of jurisdiction based on the employer's argument that it lacked sufficient control over its employees' working conditions, given the constraints imposed by its contract with the federal government. *Id.* The Board reversed, concluding that "whether there are sufficient employment matters over which unions and employers can bargain is a question better left to the parties at the bargaining table and, ultimately, to the employee voters in each case." *Id.* The

Board should not itself "be deciding as a jurisdictional question which terms and conditions of employment are or are not essential to the bargaining process." *Id.* at 1357.

As the Board explained, no particular subject is absolutely necessary for a meaningful collective bargaining relationship and, "[w]hile economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated at the bargaining table." *Id.* at 1357. "Moreover, it is unrealistic to characterize such topics as disciplinary procedure, including arbitration; strike provisions; management-rights clauses; and employee promotions, evaluations, and transfers as unimportant to the bargaining process." *Id.* Emphasizing that a rule requiring the Board to evaluate "in each case the employer's ability to bargain about certain specified topics [would] invite[] lengthy litigation and controversy which the parties and the Board can ill afford," the Board concluded that "it is not proper for [it] to decide whether to assert jurisdiction based on [its] assessment of the quality and/or quantity of factors available for negotiation." *Id.* at 1358. Rather, "it is for the parties to determine whether bargaining is possible with respect to [matters subject to external constraints] and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances." *Id.*

The Board has constantly adhered to these principles in the 20 years since *Management Training Corp.* *See, e.g.*, *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010) (citing *Management Training Corp.* for the proposition that "the Act vests in such employees, rather than in the Board, the decision whether they will benefit from collective bargaining."); *Albert Eaddy D/B/A Recana Solutions*, 349 NLRB 1163 (2007) (applying *Management Training Corp.*); *Jacksonville Urban League, Inc.*, 340 NLRB 1303 (2003) (reaffirming *Management Training Corp.* and rejecting argument that it should be overruled).

Further, the principles set forth in *Management Training Corp.* are entirely consistent with U.S. Supreme Court decisions holding that limitations on the available scope of bargaining do not preclude the Board from finding that an employer-employee relationship exists under the NLRA. In *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947), for example, the Supreme Court upheld the Board's determination that private guards at a manufacturing plant, who were required by War Department regulations to be organized as civilian auxiliaries to the military police of the U.S. Army, were "employees" under the NLRA, despite the Army's extensive control over many terms and conditions of their employment. The Court reached this conclusion even though it acknowledged that, due to those legal constraints, the plant "was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service." *Id.* at 413. The Court looked at the overall relationship between the parties, emphasizing that no particular aspect of the employment relationship is determinative and that "where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." *Id.* at 414.

Responding to concerns similar to those expressed here by Northwestern, the Supreme Court in *E.C. Atkins* explained that even where recognition of employee status may create some tension with a body of outside constraints, that "does not qualify as a legal basis for taking away from the [employees] all their statutory rights." *Id.* at 405. To the contrary, "unionism and collective bargaining are capable of adjustments to accommodate the special functions of [the employees whose status was at issue in that case]." *Id.*; *see also Firstline Transportation Security, Inc.*, 347 NLRB 447, 456 (2006) (citing *E.C. Atkins* for the proposition that "collective bargaining [is] capable of adjustments" and that security screeners employed by private security

company under contract with the Transportation Security Administration are within the Board's jurisdiction).[1] If the NLRA is flexible enough to accommodate collective bargaining by militarized plant guards during times of war, surely it can accommodate bargaining by college football players.

Although Northwestern largely ignores these decisions, many of its arguments about the impact of external constraints on its ability to bargain were expressly rejected by the Board in response to Member Cohen's dissent in *Management Training Corp*. For example, in response to his assertion that an employer cannot be expected to bargain in good faith if there are mandatory subjects of bargaining that it "lack[s] the ability to alter," 317 NLRB at 1358-59 (Cohen, dissenting), the Board reiterated that collective bargaining often occurs in settings where the parties are constrained by external forces:

> Because of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters which they cannot control as a practical matter or because they have made a contractual relationship with private parties or public entities.

317 NLRB at 1359. Northwestern's contractual commitments to the NCAA and Big Ten Conference – which are voluntary associations that it has chosen to join, and whose rules and restrictions are currently in a state of flux, *see O'Bannon v. NCAA*, No. 4:09-cv-03329-CW (N.D.

[1] The Board in *Management Training Corp.* also cited several Supreme Court decisions in rejecting the proposition "that certain terms and conditions of employment are essential to the employer's ability to effectively bargain." 317 NRLB at 1357-58 (citing *Am. Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Ins. Agent's Union*, 361 U.S. 477 (1960); *NLRB v. Am. Ins. Co.*, 343 U.S. 395 (1952)). In these cases the Court made clear that "the National Labor Relations Act does not regulate substantive terms with respect to wages and other terms and conditions of employment," *id.* at 1358, and that "[w]hether a contract should contain a particular provision is 'an issue for determination across the bargaining table, not by the Board.'" *Id.* (quoting *Am. Ins. Co.*, 343 U.S. at 409).

Cal.)[2] – are no different than the outside constraints the Board considered in *Management Training Corp.* As the Board concluded, "without question, an employer's voluntary decision to contract away some of its authority over terms and conditions of employment should not be determinative of the Board's jurisdiction." 317 NLRB at 1359.

Northwestern also makes the related argument that if its grant-in-aid scholarship football players are recognized as "employees," the university "would face unfair labor practice charges for refusing to negotiate over many mandatory subjects of bargaining that are strictly regulated by the NCAA and Big Ten Conference." RFR at 43. But this argument was rejected in *Management Training Corp.* as well:

> We find it unnecessary to consider specifically the circumstances under which the Board would or would not find that an employer had committed an unfair labor practice by failing to bargain over a matter asserted to be beyond the employer's control, as *it is well settled that such issues are not relevant to the Board's jurisdiction.*

Id. at 1359 (emphasis added).

Finally, it should be noted that MLSPU has negotiated a collective bargaining agreement ("CBA") and maintained a constructive bargaining relationship with Major League Soccer under a set of external constraints very similar to those that Northwestern has identified. Just as Northwestern subjected itself to the rules of the NCAA and Big Ten Conference when it decided to affiliate with those organizations, so did MLS subject itself to the governance of the U.S. Soccer Federation ("USSF") and the Federation Internationale de Football Association ("FIFA"). In light of these commitments, the MLSPU CBA contains a provision acknowledging:

> [FIFA and USSF] have rights affecting the conduct of MLS's business, and . . . MLS may implement mandatory dictates of FIFA and/or requirements of the

[2] Indeed, universities belonging to the major athletic conferences are calling for change within the NCAA and seeking greater autonomy to develop their own rules. *See* Ben Strauss, "Big Ten Joins Pac-12 in Pressing the N.C.A.A. to Make Changes," *N.Y. Times* (June 24, 2014).

> USSF without bargaining over the decision to implement such mandatory dictates. If such a mandatory dictate would result in (a) a change in a Player benefit under an existing rule or regulation; or (b) the adoption of a rule or regulation which would change a Player benefit under an existing rule or regulation or impose an obligation upon the Players which had not previously existed, MLS and the Union shall bargain in good faith over the effects of the implementation of such a mandatory dictate.

MLS Art. 5. Those outside constraints have not impeded MLS's ability to bargain with MLSPU, and the outside constraints identified by Northwestern should not prevent the university and CAPA from developing a constructive collective bargaining relationship either.

IV. Professional Sports Unions Commonly Bargain Over the Types of Issues that Would be on the Table in Negotiations Between CAPA and Northwestern

Even if Northwestern were correct as a legal matter that the Board could deny "employee" status to its grant-in-aid football players if external constraints (principally, the NCAA, Big Ten Conference, and student-wide university rules) left few issues available for bargaining, its argument must fail as a factual matter because, as amici's bargaining experience demonstrates, a vast array of issues critically important to athletes can be negotiated even against the backdrop of purported constraints identified by Northwestern. Amici have had great success negotiating and administering bargaining agreements that further the interests of our athlete members *and* our sports as a whole. Our experience underscores the rich variety of subjects over which CAPA and Northwestern might productively bargain regardless of any external constraints. Given that the *work* performed by Northwestern's football players is largely the same as the *work* performed by the professional athletes we represent, it should be no surprise that professional athletes in all five major North American sports leagues bargain over issues similar to those identified by Northwestern's football players as appropriate subjects of bargaining.

To be sure, the collegiate setting in which Northwestern's grant-in-aid football players provide services to their university is not identical to the settings in which professional football, basketball, baseball, hockey, or soccer players provide services to their clubs. But those differences have little to do with the nature of the labor these athletes provide, or with the value these athletes place on securing contractual commitments from their employers to provide health and safety protections, job security, freedom from arbitrary decision-making, and a fair process for resolving workplace disputes. Accordingly, just as amici have successfully negotiated many contract provisions encompassing issues that go well beyond basic wages and other economic benefits, so too is there ample room for the college athletes to negotiate over similar subjects in their future bargaining with Northwestern. [3]

[3] Northwestern's attempt to distinguish its football players from professional athletes because the professional sports unions "negotiate[] on behalf of *all players* with the *collective ownership of every team in the league*," RFR at 41 n.25 (emphasis in original), is misplaced. Northwestern's assertion that "[i]n no professional sports league in North America do players negotiate on a team-by-team basis," *id.*, ignores a key aspect of professional athletes' employment relationships. Although players' unions negotiate a single collective bargaining agreement with the collective ownership of each league, thereby setting out a broad framework applicable to all players and franchise owners, players and their agents negotiate with the individual franchises over the specific terms of their own contracts, using as a starting point the standard player contracts whose terms are often set by the global CBA. *See, e.g.*, MLB Art. III (establishing Uniform Player Contract and noting that CBA shall govern in the event of any conflict, but noting that subject to certain limitations "nothing herein contained shall limit the right of any Club and Player to enter into Special Covenants in the space provided in a manner not inconsistent with the provisions of this Agreement"). Although individual players' contracts may not conflict with the terms of their CBA, those CBAs permit varying degrees of autonomy to set unique terms and conditions of employment – including compensation. Therefore, Northwestern's assertion that bargaining on a team-by-team basis will be unwieldy and unworkable is belied by the fact that in the professional sports context, league-wide collective bargaining exists in parallel with *player-by-player* bargaining with individual franchises. Although the professional model is more complex than the model that CAPA proposes here, it has proved workable for decades in many different professional leagues.

In the paragraphs that follow, we provide several examples of subjects of bargaining that are likely to be as important for Northwestern's college athletes as they are for the professional athletes whom amici represent.

A. Health and Safety

One of the most critical sets of issues for all competitive athletes, at every level, is health and safety – a subject that has been at the forefront of CAPA's attempts to organize college athletes from the beginning. *See* RD Decision at 23; CAPA's Response to Request for Review at 26 (identifying "safety protections" as a primary concern of CAPA). The CBAs negotiated by amici illustrate the types of health and safety protections that may be the subject of bargaining for CAPA, as well as the feasibility of addressing these important issues through collective bargaining. Although the extensive CBA provisions incorporating those protections are too numerous to describe, we set forth below several examples of the range and scope of such provisions. Surely, the importance of health and safety protections to competitive athletes, whose performance is so closely tied to their physical well-being and whose on-field success depends so much on their ability to compete to the best of their physical abilities, should not be a matter of serious dispute.

One procedural mechanism negotiated by professional athletes to ensure their (and their union representatives') ability to provide ongoing input into health and safety issues is the joint labor-management safety committee. All five major North American sports unions have negotiated the right to player representation on joint committees whose focus is to protect player health and safety. For example, the MLBPA has negotiated a contract provision establishing a "Safety and Health Advisory Committee." MLB Art. XIII(A).[4] The mandate of that committee,

[4] For clarity, the CBAs referred to herein are cited by the acronym of the relevant league. The only exception is the CBA negotiated by the Major League Soccer Players' Union. The

"which shall be comprised of an equal number of members representing the [Players'] Association and representing the Clubs," *id.* Art. XIII(A)(1), is "(a) to deal with emergency safety and health problems as they arise, and attempt to find solutions, and (b) to engage in review of, planning for and maintenance of safe and healthful working conditions for Players." *Id.* Similarly, the NFLPA has bargained for the creation of an "Accountability and Care Committee." NFL Art. 39, Sec. 3. This committee, which includes the Commissioner of the NFL and the Executive Director of the NFLPA (or their designees) as well as three members appointed by the union and three by management, is charged with the following mission:

> The Committee shall: (i) encourage and support programs to ensure outstanding professional training for team medical staffs, including by recommending credentialing standards and continuing education programs for Team medical personnel; sponsoring educational programs from time to time; advising on the content of scientific and other meetings sponsored by the NFL Physicians Society, the Professional Football Athletic Trainers Association, and other relevant professional institutions; and supporting other professional development programs; (ii) develop a standardized preseason and postseason physical examination and educational protocol to inform players of the primary risks associated with playing professional football and the role of the player and the team medical staff in preventing and treating illness and injury in professional athletes; (iii) conduct research into prevention and treatment of illness and injury commonly experienced by professional athletes, including patient care outcomes from different treatment methods; (iv) conduct a confidential player survey at least once every two years to solicit the players' input and opinion regarding the adequacy of medical care provided by their respective medical and training staffs and commission independent analyses of the results of such surveys; (v) assist in the development and maintenance of injury surveillance and medical records systems; and (vi) undertake such other duties as the Commissioner and Executive Director may assign to the Committee.

Id. Art. 39, Sec. 3(c); *see also* NHL Art. 34.9 (establishing "Joint Health and Safety Committee"); MLS Art. 24.1 (establishing joint "Safety Committee"); NBA Art. XXII, Sec. 2

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relationship between Major League Soccer and the Major League Soccer Players' Union is currently governed by a collective bargaining agreement and a fully-executed Memorandum of Agreement specifying revisions to that CBA. The MLS-MLSPU CBA is cited herein as "MLS" and the Memorandum of Agreement as "MLS MOA." All of the CBAs cited are publicly available on the relevant union's website.

("Representatives designated by the Players Association shall participate in meetings of the committee of Team physicians appointed by the NBA for the purpose of discussing matters related to the medical care and treatment of players."). Among other programs, these joint committees have created an interdisciplinary team of experts to assess evidence on broken bats in baseball and provide recommendations, *see* MLB Press Release, "Safety and Health Advisory Committee Issues Update" (Sept. 9, 2008);[5] implemented a process for assessment of batting helmets, MLB Attachment 4; established protocols regarding assessment and management of concussions, MLB Art. XIII(C) & Attachment 36; and created a joint subcommittee to study and make recommendations concerning protective equipment, NHL Art. 34.9(e)(1).

Another important set of protections that amici have negotiated are formal safety complaint procedures. These procedures enable the unions to raise safety concerns on behalf of their members, taking the burden off individual players who may fear stigma, retaliation, or worse if they voice their own complaints on an individual basis. For example, the CBA negotiated by the MLBPA provides:

> [W]hen a safety complaint is made by the Association to the Office of the Commissioner, the Commissioner shall promptly designate a representative to investigate and to attempt to resolve the problem. The Commissioner shall promptly notify the Association of the results of the investigation and of all attempts to resolve the problem.

MLB Art. XIII(B); *see also* NFL Art. 39, Sec. 3(d) (establishing procedure by which players may submit complaints to the "Accountability and Care Committee").

[5] Available at: http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080909&content_id=3443585&vkey=pr_mlb&fext=.jsp&c_id=mlb.

Although all professional sports teams must maintain an in-house medical staff or retain outside doctors for the purpose of treating player injuries (as guaranteed by the unions' CBAs),[6] several CBAs also guarantee players the right to seek a second medical opinion at the team's expense. For example, the CBA negotiated by the NHLPA provides:

> A Player may seek a second medical opinion regarding a diagnosis made by a team physician or a course of treatment (including the timing thereof) prescribed by a team physician . . . from a list of medical specialists mutually agreed upon by the [Joint Health and Safety Committee].

NHL Art. 34.4(a). That CBA also provides:

> If a Player uses the services of a Second Medical Opinion Physician and satisfies [certain conditions], the Club shall pay the reasonable costs for the services of a Second Medical Opinion Physician, including reasonable transportation and hotel costs.

Id. Art. 34.4(c).

Similarly, the CBA negotiated by the NFLPA provides:

> A player will have the opportunity to obtain a second medical opinion [at the Club's expense if certain conditions are met]. . . . A player shall have the right to follow the reasonable medical advice given to him by his second opinion physician with respect to diagnosis or injury, surgical and treatment decisions, and rehabilitation and treatment protocol, but only after consulting with the club physician and giving due consideration to his recommendations.

NFL Art. 39, Sec. 4; *see also* MLB Art. XIII(D) (providing for second medical opinion at Club's expense);[7] MLS Sec. 9.3(iv) ("If the League's or the Player's Team's doctor recommends

[6] These CBAs often set out minimum requirements for physicians, athletic trainers and therapists, including such details as training of such specialists, the number to be employed by each team, and the proximity of such specialists to the playing field or team bench during games. *See* NHL Art. 34.2; NFL Art. 39, Sec. 1-2; MLB Art. XII(E). Additionally, the CBA negotiated by the NFLPA establishes standards for a minimum preseason physical examination that each player is to undergo. NFL Art. 39, Sec. 6 & Appx. K.

[7] This second opinion is to be given by a doctor of the player's choice, chosen from a list of physicians developed and updated by the Commissioner's Medical Advisory Committee, "in consultation with a medical professional designated by [MLBPA]." MLB Art. XIII(D). The

treatment for the Player for a soccer-related injury, the Player shall be entitled to request and receive a second opinion (which, provided the medical specialist giving it is within the geographical area in which the Team is located, shall be at MLS's expense) as to the advisability of such treatment."); NBA Art. XXXI, Sec. 8 (providing for independent physician agreed upon by the league and Players Association to serve as an independent medical expert and consultant to an arbitrator when resolving grievances arising from medical issues). These important protections ensure that players need not rely exclusively on a medical staff retained by their teams, whose interests – economic or otherwise – may diverge from the players'. Many CBAs also guarantee athletes the right to the surgeon of their choice. *See, e.g.*, NHL Art. 34.5; NFL Art. 39, Sec. 5.

Finally, several unions have bargained for protections designed to reduce the risk of concussions, a topic of significant interest to CAPA and the Northwestern football players. In particular, the NFLPA has bargained for a limitation on the number and frequency of practices at which players must wear helmets and shoulder pads. NFL Art. 24, Sec. 1. The goal of this provision is to limit the amount of contact activity at football practices, thereby lowering the risk of injury in general and concussions specifically. The MLBPA has negotiated a return-to-play protocol, under which no player who has suffered a concussion may return to play until the player's club has submitted required documentation to the MLB medical director and the MLBPA. MLB Art. XIII(C) & Attachment 36, para. 4. If the league's medical director and the union do not agree whether the player is fit to return to play, they must refer the matter to an independent expert. *Id.* Attachment 36, para. 5. The NHLPA, together with the NHL, has created a Concussion Working Group comprised of medical experts, NHL Art. 34.9(e), and has

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MLBPA has also negotiated an agreement providing for a third medical opinion should the Club's physician and the physician chosen by the player disagree. MLB Attachment 35.

negotiated a CBA provision requiring that at least one team physician and athletic trainer have familiarity with standardized concussion assessment tools recommended by the Concussion Working Group, *id.* Art. 34.2(a) & (b). *See also* NBA Art. XXII, Sec. 8 (requiring implementation and periodic review of concussion policy).

These are just a handful of examples of the ways in which athletes' unions have bargained for important health and safety protections. There is no reason to deny Northwestern's grant-in-aid scholarship football players the ability to seek similar protections, as the health and safety interests of these college-age athletes are surely no less important than the comparable interests of their professional counterparts.

B. Scheduling

Personal work schedules are another frequent subject of bargaining for professional athletes, just as they are in most employment relationships, and the ability to negotiate scheduling issues goes far beyond any issue of what game has been scheduled for which date and against which opponent. *See, e.g.*, *In re Raven Servs. Corp.*, 331 NLRB 651 (2000) (work schedules are a mandatory subject of bargaining); *Millwrights, Conveyors and Machinery Erectors Local Union No. 1031*, 321 NLRB 30, 31 (1996) (work hours are a mandatory subject of bargaining). Personal scheduling issues are particularly important to college football players given the demanding time pressures of Division I football, which they must balance with academic responsibilities. Collective bargaining on these issues may be especially important in the collegiate context because many coaching staffs are evaluated (and their compensation and job security is based) in large part on their team's on-field success, which as a practical matter may discourage coaches from devoting sufficient attention and resources to the athletes'

academic progress (at least beyond ensuring that their players satisfy the bare minimums required to maintain eligibility under the NCAA rules).[8]

Work-life balance is as important to college athletes as to any other group of hard-working individuals. Allowing collective bargaining over the on-duty and personal/team training schedules will enable players to exert greater control over their personal schedules, and thus provide them greater leeway to design academic and other extra-curricular schedules that are consistent with their personal long-term goals.[9] While CAPA has made clear that it does not intend to seek bargaining over the academic requirements to which its members are subject as students, there is still considerable room for bargaining over scheduling provisions that will empower its members to strike a fair balance between their athletic, academic and personal pursuits.

Again by way of example, the CBAs negotiated by the five major North American sports unions address many scheduling issues. These include:

- Offseason workouts and training camps, *see* NFL Art. 21-23; NHL Art. 15.3; MLB Art. XIV(A); NBA Art. XX, Sec. 1; MLS MOA Sec. 17.2;
- Days off, *see* NFL Art. 35; NHL Art. 16.5(a); MLB Art. V(C); NBA Art. XX, Sec. 8; MLS MOA Sec. 13;
- Holidays, *see* NHL Art. 16.5(b); NBA Art. XX, Sec. 5;

[8] Recent scandals at other well-regarded research universities concerning falsification of academic records to protect elite collegiate athletes illustrate the significance of these concerns. *See, e.g.*, Paul M. Barrett, "In Fake Classes Scandal, UNC Fails Its Athletes – and Whistle-Blower," *Bloomberg BusinessWeek* (Feb. 27, 2014); Lynn Zinser, "N.C.A.A. Penalizes Florida State for Academic Fraud," *N.Y. Times* (Mar. 6, 2009).

[9] For instance, Kain Colter abandoned his goal of attending medical school, switching his major from pre-med to psychology, after football coaches discouraged him from taking a chemistry class required for the pre-med major. RD Decision at 11.

- Restrictions on game times in connection with travel obligations, MLB Art. V(C); NBA Art. XX, Sec. 5(b);
- Required rest time upon arrival at hotel on road trips prior to team activities, NHL Art. 16.8(b).

All of these are topics over which CAPA may seek to bargain, even accepting the NCAA baselines as the starting point; and amici's experience demonstrates that issues of work-related scheduling can be an important subject for players and teams alike.

In its challenge to the Regional Director's factual findings, Northwestern asserts that much of the time its football players claim to spend on football-related activities is actually "voluntary." *See* RFR at 23-24. As a legal matter, that should make little difference, given that the coaching staffs know about, and encourage, those activities. Surely it cannot be true that an employer's characterization of a work activity as "voluntary" necessarily makes it so. Competitive athletes in all sports, at all levels, are familiar with the concept of the coaching staff prescribing a regimen of nominally "voluntary" activities that, in fact, are not truly voluntary if one wants to maintain one's standing on the team. Giving players the opportunity to bargain over what sport-related activities are truly voluntary may therefore provide substantial benefits to Northwestern's athletes. Indeed, many professional sports unions have bargained for express contract language prohibiting coaches and other team officials from exerting indirect pressure requiring team activities during time that is supposed to be the athlete's own. For example, an attachment to the MLB CBA memorializing the parties' agreement concerning "mini-camps" provides:

> Attendance by 40-man roster Players at a Club's mini-camp is purely voluntary. The parties acknowledge that it is essential to this agreement that Clubs refrain from any activity which suggests that invitations to mini-camps are anything less

> than entirely up to the Player. There will be no consequences to an Eligible Invitee if he decides not to attend.

MLB Attachment 37; *see also* NFL Art. 21, Sec. 1 ("No player shall be required to attend or participate in any offseason workout program or classroom instruction of a Club other than as provided in Article 22. Any other Club offseason workout programs and classroom instruction sessions shall be strictly voluntary . . . .").

C. Grievance Procedures

Amici's bargaining agreements also include carefully negotiated dispute-resolution procedures, and CAPA and Northwestern can certainly include similar provisions in their bargaining agreement as well. Every successful employer-employee relationship requires a fair and efficient process for resolving disputes, in which both parties are entitled to have their positions fairly considered. Each of amici's CBAs includes a multi-step grievance procedure for resolving contract disputes. In each case, the negotiated procedure is designed to encourage effective communication between the parties and informal dispute resolution, while providing a mechanism for resolving particularly difficult problems after other attempts have failed.

For example, the CBA negotiated by the MLBPA provides a three-step grievance process that the parties have used with great success for decades. At Step 1 of this process, a player must "first discuss the matter with a representative of his Club designated to handle such matters, in an attempt to settle it," and if the matter is not resolved provide written notice of his grievance to the Club's representative. MLB Art. XI(B). The Club's representative must then provide the player a written decision on the grievance, after which the player has 15 days to appeal the decision to MLB's Labor Relations Department. *Id.* At Step 2, representatives of the Labor Relations Department and the MLBPA meet to discuss the grievance in an attempt to settle, and the player and club principals may also be present if the parties agree. *Id.* Within 10 days of that

meeting, the Labor Relations Department must issue a written decision, which may be appealed with 15 days by the player or the MLBPA. *Id.* Appeal of a Step 2 decision goes to an impartial arbitrator selected by the League and the MLBPA or, at either party's election, to a tripartite panel composed of the impartial arbitrator and two party arbitrators. *Id.* Art. XI(A) and (B).[10] The hearing held by the impartial arbitrator or arbitration panel is governed by rules of procedure established by the CBA. *Id.* Appendix A. The decision of the impartial arbitrator or the arbitration panel is a "full, final and complete disposition of the Grievance appealed to it." *Id.* Art. XI(B).[11] Other professional athletes' unions have negotiated similar grievance procedures, tailored to the unique circumstances of each sport and league. *See* NFL Art. 15-16, 43-44; NHL Art. 17; MLS Art. 21; NBA Art. XXXI and XXXII.[12]

Similar procedures can surely be negotiated in the college setting. Recognizing this, Northwestern has expressed concerns that having a grievance procedure would impair academic freedoms and lead to disputes over grades and academic requirements. These concerns are misplaced. Northwestern's grant-in-aid scholarship football players would be bargaining over their employment as football players, not their status as students. Besides, the parties can always agree to exclude certain issues from the scope of their grievance procedure. *See also infra* p. 27. As with the other issues discussed herein, Northwestern's concerns about the potential for

[10] The impartial arbitrator sits indefinitely, but his or her appointment may be terminated at any time by either party; provided that the impartial arbitrator will have continuing authority to resolve matters fully submitted. MLB Art. XI(A).

[11] The presence of this dispute resolution mechanism is itself a useful stimulus for the parties to resolve any potential conflicts informally. As of the date this brief is filed, MLBPA has not arbitrated a non-drug related grievance since 2011.

[12] The CBAs negotiated by athletes' unions often provide for standardized levels of discipline that may be imposed for specific infractions of team or league rules. *See* NHL Art. 18 and 18-A; NFL Art. 42; MLS Art. 20; MLS MOA Art. 20; NBA Art. VI.

grievances over academic matters are unfounded and insufficient to trump the players' statutory right to collective bargaining.

D. Job Security/Compensation Protection

One of Northwestern's legal arguments is that its fixed-amount grant-in-aid scholarships cannot be considered compensation because in most employment relationships, the amount of an employee's payment is based on the quality of that employee's performance. *See* RFR at 16 (Northwestern "honors its athletic scholarships even if a student-athlete does not play in a single football game" because of injury or lack of skill); *id.* at 24-25 ("Once the student-athlete accepts the scholarship tender offer, signs a letter of intent, and enrolls in the University, his financial aid is guaranteed as long as he shows up for practice and follows the rules. This is not pay for performance."). Yet this does not differentiate Northwestern's football players from employees in other contexts. Many "employees" are paid fixed salaries based on lock-step salary structures. Moreover, it is well settled that a person who provides services to another can be deemed an "employee" even if not monetarily compensated for those services (which is why there is so much litigation these days, for example, over unpaid "interns," *see, e.g., Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (certifying class of unpaid interns to bring claims under the Fair Labor Standards Act and New York Labor Law)). For purposes of the present amicus brief, though, what is relevant is that job-security and compensation-protection provisions are often the subject of bargaining in professional sports CBAs. Indeed, the scholarship-protection provisions for college athletes cited by Northwestern are quite similar to the salary-protection provisions in amici's own CBAs.

For example, the CBA between Major League Baseball and the MLBPA provides that if a team terminates a player's contract during the baseball season "for failure to exhibit sufficient skill or competitive ability," the player "shall be entitled to receive termination pay from the

Club in an amount equal to the unpaid balance of the full salary stipulated in paragraph 2 of his Contract for that season." MLB Art. IX(C). Further, if a player's contract is terminated because of injury, "the Player shall be entitled to receive from the Club the unpaid balance of the full salary for the year in which the injury was sustained, less all workers' compensation payments . . . ." *Id.* Art. IX(E).[13] Similarly, under the CBA between the National Hockey League and the NHLPA, "A Player under an SPC [Standard Player Contract] who is disabled and unable to perform his duties as a hockey Player by reason of an injury sustained during the course of his employment as a hockey Player . . . shall be entitled to receive his remaining Paragraph 1 Salary and Signing Bonuses due in accordance with the terms of his SPC for the remaining stated term of his SPC as long as the said disability and inability to perform continue . . . ." NHL Sec. 23.4. And the CBA between Major League Soccer and the MLSPU provides that all players over 24 years of age with three years of MLS service have guaranteed contracts that "shall not be terminated by MLS by virtue solely of the quality of the Player's on-field performance or the fact that the Player may have sustained an injury . . . ." MLS MOA Art. 18; *see also* NFL Art. 30 (termination pay), Art. 45 (injury protections), Art. 60 (severance pay), Appendix A, para. 9 (standard NFL Player Contract providing for payment of salary for duration of season in event of injury); NBA Art. II, Sec. 4(a)-(d) (noting that team and player may negotiate terms of the Uniform Player Contract providing that player will receive his base compensation if contract is terminated due to lack of skill, basketball-related injury, other injury or death).

[13] Relatedly, the MLBPA CBA provides that if a major league player agrees to assignment to the minor leagues for purposes of rehabilitation from an injury, he is guaranteed his major league salary as well as travel expenses such as hotel accommodations and per diem meal allowances at the level negotiated for major league players. MLB Art. XIX(C)(3)(d).

Northwestern's assertion that it has committed to honor all grant-in-aid scholarships even in the event of injury or a lack of playing time therefore does nothing to distinguish its grant-in-aid football players from the professional athletes whom amici represent. Indeed, the prevalence of similar compensation-protection provisions in the five major North American sports unions' CBAs underscores the importance of giving Northwestern's athletes the opportunity to guarantee those protections though binding contract language, without having to rely solely on the university's good faith or largesse.[14]

E. Rights of Publicity and Licensing

Two federal courts of appeal have recently held that college athletes may pursue state-law right-of-publicity claims against a video game manufacturer and the NCAA's licensing arm, based on a claim that the manufacturer appropriated the athletes' likeness without their permission for use in a reality sports video game. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). Both appellate decisions assume as the starting point for their analysis that the college athletes pursuing those claims had potentially valuable, legally protected, economic rights in the commercial use of their names, images, and likenesses. Although current NCAA rules prohibit collegiate athletes from profiting from their own rights of publicity through advertising or promotion, *see* NCAA 2013-14 Division I Manual §12.5.2, the validity of those rules is very much uncertain given the current antitrust litigation against the NCAA. *See O'Bannon v. NCAA, supra.* Moreover, the NCAA is now apparently construing those rules to

[14] Although Northwestern asserts that it honors its athletic scholarships even in the event of injury or a lack of skill, it is under no obligation to do so, as evidenced by the fact that many Division I football programs are not so generous. *See* Meghan Walsh, "'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes," *The Atlantic* (May 2013).

allow the athletes involved in those lawsuits to share in the proceeds of recent settlements with Electronic Arts based on *prior* appropriations of their likenesses.[15]

Regardless of what form the NCAA rules take or how they are construed in the future, Northwestern's grant-in-aid football players unquestionably have an interest in prohibiting unauthorized commercial use of their names, images and likenesses, whether they personally seek to benefit economically from that use or not. *Cf.* NCAA 2013-14 Division I Manual §12.5.2.2 (requiring athletes to "take steps to stop such an activity" when their name or picture "appears on commercial items . . . or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission."). Thus, even apart from whether those college athletes have the legal right to share in the profits generated by use of their names, images, and likenesses, and assuming the university has the right to use the players' images for *some* purposes, surely the players should be allowed to bargain over the extent to which their university can profit from any permissible commercial use of their likenesses and over how those profits may be used.

Not surprisingly, several of the CBAs negotiated by the five major North American sports unions contains provisions addressing licensing and/or rights of publicity. *See* NHL Art. 25; NBA Art. XXVIII, XXXVII; MLS Art. 28; *see also* MLB Schedule A (Uniform Player's Contract) Sec. 3(c); NFL Appendix A (Standard Player Contract) Sec. 4. College athletes should be entitled to bargain over publicity rights issues as well, at least insofar as such bargaining is consistent with whatever NCAA eligibility rules are then in effect.

[15] *See* Ben Strauss and Steve Eder, "NCAA Settles One Video Game Suit for $20 Million as a Second Begins," *N.Y. Times* (Jun. 8, 2014).

V. Permitting Northwestern's Grant-in-Aid Football Players to Bargain Collectively will Not Unduly Intrude on Academic Matters, the Coaching Staff's Prerogatives, or the Good of the Game of College Football

Northwestern makes the alarmist argument that "imposing collective bargaining upon the relationship between the student-athletes and the University would interfere with traditional academic freedoms," RFR at 37, and that if college football players are treated as "employees," they will insist on bargaining over issues such as class attendance, plagiarism, admission standards, and minimum grade point average requirements, "[a]ll of [which] would unduly interfere with and intrude into educational matters which, as the Board noted in *Brown*, are based on unique, individualized considerations and are not well-suited to the collective-bargaining process." *Id.* at 38 (citing *Brown University*, 342 NLRB 483, 490 (2004)). But CAPA has expressly disavowed any intent to bargain over any of those specific issues, and Northwestern's football players seek to bargain over the terms and conditions of their employment as football players only, not their status as students.[16] Whether or not Northwestern and CAPA negotiate a grievance procedure that permits grant-in-aid football players to challenge academic rulings that result in a loss of eligibility, they can certainly restrict the scope of permitted grievances to matters that directly affect the represented athletes *as athletes*, while leaving any disputes over academic decisions affecting those individuals *as students* to the existing grievance procedures that the university already makes available to its entire student body. *See* Northwestern University Student Handbook 2013-14, at 56-72.[17] Whatever the parties might choose to negotiate, however, should not affect whether they should be *allowed* to negotiate, consistent with whatever rules already govern student affairs at Northwestern.

[16] To the extent academic issues become even tangentially relevant to decisions made by the football coaching staff (such as scheduling around class times), these are the types of external constraints around which bargaining agreements are always negotiated. *See supra* at 4-10.

[17] Available at www.northwestern.edu/studentaffairs/publications/media/pdfs/handbook.pdf.

Should the Board recognize Northwestern's scholarship football players as "employees" under the Act, there will be ample opportunity to resolve any disputes over the proper scope of the parties' bargaining obligations later. Most of the concerns that Northwestern raises are only tangentially related to the athletic functions performed by its grant-in-aid football players, and are unlikely to be deemed mandatory subjects of bargaining anyway. *See First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 679 (1981) (establishing balancing test for determining mandatory subjects of bargaining, asking whether "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business"). As Members Liebman and Walsh noted in their *Brown University* dissent:

> [N]ot every subject of interest to graduate assistants would be a mandatory subject of bargaining. The Board presumably would be free to take into account the nature of the academic enterprise in deciding which subjects are mandatory and which merely permissive.

342 NLRB at 499 n.28 (Liebman and Walsh, dissenting). Regardless, disputes over the proper scope of the parties' collective bargaining relationship should not affect the threshold decision over whether petitioners have a statutory right to "employee" status in the first place. *See supra* at 5-9.

Further, any concern that recognizing Northwestern's scholarship football players as employees will necessarily impair "academic freedoms" is belied by the long history of constructive collective bargaining involving other employees of private universities. After the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), in which the Court pointed out that faculty members should not be disqualified from employee status simply because they have the freedom to "determine the content of their own courses, evaluate their own students, and supervise their own research," *id.* at 690 n.31, the Board has on several occasions recognized faculty member bargaining units at private universities. Yet in none of those cases

has there been any noticeable impairment to "academic freedom." *See, e.g.*, *Pace University*, 349 NLRB 68 (2007); *University of Great Falls*, 325 NLRB 83 (1997); *St. Thomas University*, 298 NLRB 280 (1990); *Marymount College of Virginia*, 280 NLRB 486 (1986). Obviously, collective bargaining on the part of university faculty – who perform a critical role in setting academic standards – cuts much closer to "academic freedoms" than does collective bargaining by football players.[18] Having rejected arguments against collective bargaining in those contexts, it is clearly reasonable for the Board to do so here as well.

Northwestern also argues that recognizing its grant-in-aid scholarship football players as employees will impermissibly intrude on the traditional role of the coach and the sanctity of the game of college football. Yet CBAs in professional sports, as in many industries, commonly include provisions that reserve certain issues to the discretion of coaches, team owners, or league officials. *See* NFL Art. 2, Sec.3; MLS Art. 5; NHL Art. 5; MLB Art. XXII; *see also* MLB Art. XI(A)(1)(b) (exempting from the grievance procedure "a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball."). These provisions, which differ in scope and effect from one CBA to another, demonstrate the flexibility that good faith bargaining provides, and should allay any concerns about undue intrusion into traditional academic or coaching prerogatives. In amici's experience, after all, the enormous current popularity (and profitability) of professional football, basketball, baseball, hockey, and

[18] *See Brown University*, 342 NLRB at 490 (academic freedoms include "not only the right to speak freely in the classroom, but many 'fundamental matters' involving traditional academic decisions, including course length and content, standards for advancement and graduation, administration of exams, and many other administrative and educational concerns") (citing *St. Clare's Hospital*, 229 NLRB 1000 (1977), *overruled by Boston Med. Cntr. Corp.*, 330 NLRB 152 (1999)).

soccer is largely *because* the parties have strong bargaining relationships, and can work together as bargaining equals to promote their sport and the good of their game.

Northwestern nonetheless insists that college football teams are special, and that permitting its athletes to engage in collective bargaining would destroy the unique bond among team members that currently exists. *See* RFR at 29. The university goes as far as to argue that extensive control by coaches over practices, meetings, travel and even athletes' meals is necessary because "there is no other way a functioning football team can operate." *Id.* But the fact that such pervasive control over athletes' lives is necessary to create team cohesion does not mean that an employment relationship cannot exist in these circumstances. Professional sports teams have special bonds too, and allowing professional athletes to assert their statutory rights as "employees" has not prevented those bonds from forming. Nor should it, especially if the parties are able to negotiate clearly delineated contract terms that respect each other's vital concerns and include a fair and effective dispute resolution mechanism – just as amici have done with their respective professional sports leagues.

VI. Conclusion

For the reasons stated above and in CAPA's filings, the Board should affirm the Regional Director's Decision and conclude that Northwestern's grant-in-aid scholarship football players are "employees" within the meaning of Section 2(3) of the Act, entitled to all of the statutory protections that accompany that status.

Respectfully submitted,

Dated: July 3, 2014

/s/Michael Rubin
Michael Rubin
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Eric P. Brown, an attorney, state under oath that I caused a copy of the foregoing **AMICUS CURIAE BRIEF OF MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION, NATIONAL HOCKEY PLAYERS UNION, MAJOR LEAGUE SOCCER PLAYERS UNION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, AND NATIONAL BASKETBALL PLAYERS ASSOCIATION IN SUPPORT OF PETITIONER COLLEGE ATHLETES PLAYERS ASSOCIATION** to be electronically filed with the National Labor Relations Board and electronically served upon the following on this third day of July, 2014.

Peter Sung Ohr Regional Director National Labor Relations Board Region 13 209 South LaSalle Street, Suite 900 Chicago, IL 60604-5208 NLRBRegion13@nlrb.gov	John G. Adam Stuart M. Israel Legghio & Israel, P.C. 306 South Washington, Suite 600 Royal Oak, MI 48067-3837 Jga@legghioisrael.com
Jeremiah A. Collins W. Gary Kohlman Ramya Ravindran Bredhoff & Kaiser, PLLC 805 Fifteenth Street, NW, Suite 1000 Washington, DC 20005-2286 Email: jcollins@bredhoff.com Email: gkohlman@bredhoff.com Email: rravindran@bredhoff.com	Stephen A. Yokich Cornfield and Feldman LLP 25 East Washington Street, Suite 1400 Chicago, IL 60602 syokich@cornfieldandfeldman.com
Joseph E. Tilson Alex V. Barbour Anna Wermuth Jeremy Glenn Meckler Bulger Tilson Marick & Pearson LLP 123 North Wacker Drive, Suite 1800 Chicago, IL 60606-1770 Joe.tilson@mbtlaw.com Alex.barbour@mbtlaw.com Anna.wemuth@mbtlaw.com Jeremy.glenn@mbtlaw.com	

/s/Eric P. Brown .
Eric P. Brown